Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1943.

No. 156

PETER W. BURNS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

October Term, 1943.

PETER W. BURNS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

PETER W. BURNS, the above named petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit on which decision was rendered on the 19th day of May, 1943, affirming the judgment of the United States District Court for the Southern District of New York, in the City of New York, State of New York, convicting petitioner, and others, of transporting or causing to be transported in interstate commerce securities alleged to be theretofore stolen and of a value of $5,000.00, in violation of Title 18, United States Code, Section 415, and of conspiring to violate such statute contrary to Title 18, United States Code, Section 88.

The mandate of the Circuit Court was filed in the office of the clerk of the United States District Court for the

Southern District of New York on the 8th day of June, 1943. Petitioner is at present confined serving the sentence imposed.

Statement.

The indictment alleged that between the 1st day of January, 1937, and the 8th day of February, 1937, both dates inclusive, petitioner, and five others, unlawfully, wilfully, and knowingly did transport and cause to be transported in interstate commerce from the City of Minneapolis, Minnesota, to the City, State and Southern District of New York, certain securities of the value of $5,000.00 and more, which had theretofore been stolen from the office of the Clerk of the United States District Court in Minneapolis, Minnesota; and with conspiring to transport such securities in interstate commerce with knowledge that they had been stolen. The second or conspiracy count of the indictment alleged the commission of certain overt acts between the 3rd and 11th days of February, 1937.

Brief Summary of Case.

At the opening of the case the petitioner defendant Peter W. Burns asked for a severance particularly directed as to a severance against Chester G. Bollenbach. The said Chester G. Bollenbach having been denied a continuance of the trial, was thereupon allowed to open as his defense, see appendix, (B).

The petitioner herein, Peter W. Burns had contended that he was in no way connected with any of the other defendants, in the alleged crime, yet in his opening the said Chester G. Bollenbach attempted to defend the said

Peter W. Burns asserting that the District Attorney trying the case, and the Federal Investigator in charge of the case, had, as far as Peter W. Burns was concerned, been guilty of wrong conduct in that they approached a woman friend of the said Peter W. Burns, and attempted to terrorize her into testifying against the said Peter W. Burns. By which conduct of the said Chester G. Bollenbach, the jury was at once notified that there was some connection between Burns and Bollenbach, and as a result of the violence of the opening of the said Chester G. Bollenbach, the trial judge committed him and adjudged him in contempt. Later there was a severance, but the damage had been done as far as the jury was concerned, showing the jury had heard that there was some connection between Chester G. Bollenbach and Peter W. Burns. Yet the Trial Court did not discharge the jury but permitted the same jury to continue with the trial of the case as against Peter W. Burns, over the objection of the said Peter W. Burns. During the course of the trial Bollenbach was called into the Courtroom for the purpose of permitting a witness to make an identification, and by reason of his conduct at that time, Bollenbach in the presence of the jury, was again held to be in contempt and sentenced to a further term of three months. (fol. 152.)

For upward of ten years prior to the filing of the indictment petitioner was engaged in the purchase and sale of stockholders' lists at 15 William Street, New York City, under the firm name of Bond & Share List Company. These lists were secured either by purchase or by making copies of public and Court records. (fols. 2063, 2064).

The Government offered testimony to the effect that in January, 1935, the gold notes described in the indictment

were seen to be on file in the office of the Clerk of the United States District Court in Minneapolis. (fols. 127-132).

In April, 1937, an Order was entered in the United States District Court in Minneapolis, directing the return of bonds filed by various claimants. (fol. 140). At that time a search was made of the files for the purpose of locating bonds that were filed, and it was then discovered that the bonds were missing. (fols. 148, 149.) Chell M. Smith, a deputy clerk of the United States District Court at Minneapolis, testified that he recalled that in January, 1937, a man came to the courthouse and made an examination of the files. (fol. 146.) Thereafter, and in May, 1941, Smith was in the United States Courthouse, Southern District of New York, and identified a man who he claimed was the one who examined the files in Minneapolis. This man was identified by him as being BOLLENBACH. (fols. 149-151.)

No testimony was offered, nor was any attempt made to show that the bonds were in the files subsequent to January of 1935, nor was there any evidence offered to show that BOLLENBACH, or any of the other defendants, took the bonds from the files.

On February 3rd ten of the bonds are alleged to have been delivered to Hart Smith & Co., securities dealers, for the purpose of being sold. (fol. 309.) On delivery of the bonds to Hart Smith & Co. a check for $2500.00 was issued to "Arnold Berendson", payment on which was thereafter stopped. (fols. 312 and 370.) Although petitioner was charged in the indictment using the alias "Arnold Berendson" the only proof in connection with this name was that the same was used by BOLLENBACH.

Subsequently, on February 5th, 1937, defendant, TURLEY, introduced BOLLENBACH who was then using the name, "Brown" to the defendants, BLASER and INGALLS. "Brown" said that he had 15 bonds that he wanted to sell. (fols. 513-516.) The following day "Brown" brought 15 bonds to BLASER and INGALLS which they sold for him. (fol. 541.)

Petitioner admitted that in January, 1937, he was in Minneapolis, where he went in connection with the recapitalization of the Minneapolis Gas Light Company. After being away from New York for two and a half months he returned in February, 1937. He also admitted knowing both TURLEY and BOLLENBACH, and had previously sold some lists to TURLEY and had purchased some lists from him. (fols. 2065-2071.) He further denied that he saw BOLLENBACH while he was in Minneapolis, (fol. 2121) or that he discussed his trip with TURLEY before leaving New York. He admitted talking to TURLEY by telephone from Chicago with reference to some lists, although he denied that TURLEY knew that he was going to make the trip before he started. (fols. 2133, 2134.)

There is no proof that petitioner knew Bollenbach was in Minneapolis, or that he even knew of the existence of the bonds, much less that they were in the files, if they were, nor is there any proof that petitioner took the bonds from the files or that he transported them to New York or elsewhere, or that he did anything in connection with them at any time.

During the course of the trial there was read into the record in the presence of the jury the testimony of the defendant, Jacobson, before the Grand Jury. (fols. 902-937.)

Although this testimony was received only as against Jacobson (fols. 905, 906), it contained prejudicial and detrimental statements affecting petitioner. By reason thereof motions were made for a severance of the trial, but these motions were denied. (fols. 937-938.)

The Government's case occupied 669 pages of the record, of which approximately half was consumed in showing that the defendant, Turley, had previously been engaged in other transactions concerning the reception of stolen goods and fraudulent transactions, in none of which petitioner was involved, nor in any way connected. It may be pointed out that there was no direct evidence at any time to connect petitioner with the matters alleged in the indictment, and that in order to reach its verdict the jury was compelled to rely upon inference and supposition and that the Circuit Court not only condoned this, but did likewise in reaching its decision.

The bonds in question, according to the Government's evidence, came to rest in New York some time prior to February 3rd, 1937, the date of delivery to Hart Smith & Co. Any evidence, therefore, of overt act committed subsequent to that time was improper and could not constitute evidence of a conspiracy, since the conspiracy to transport in interstate commerce must necessarily have come to an end prior to that time.

It is submitted that prejudicial error of great magnitude was committed by the Trial Court when it charged the jury as follows:

> "It is not necessary at all for Turley or Jacobson to be out in Minneapolis at all. In saying what I am about to say please do not feel that I am expressing any view held by myself, but I am trying to illustrate

to you. Let us say for example Turley agreed to finance Bollenbach and Burns in going out to steal these bonds in Minneapolis, knowing that they were there in the clerk's office. He would be as guilty then if they brought back the bonds to Turley in New York as if Turley was out in Minneapolis, because they would be acting for him in this work.

"It is not for me to say, and I don't mean to indicate, as I said a moment ago, that that was the fact; but you are entitled to take all these circumstances into account in coming to a conclusion whether this is a planned theft or transportation of these bonds." (fols. 2477, 2478.)

Petitioner respectfully submits that by reason of the foregoing he was denied trial according to due process of law.

Questions to be Presented.

1. Whether the said Peter W. Burns by reason of the fact that the jury was not discharged and was allowed to continue with the case after the contempt by Bollenbach, had a fair and impartial jury.

2. Whether the admission of testimony of alleged crimes committed by the defendant Turley, with which the said Peter W. Burns had no connection, and which crimes were not of like nature with that charged in the indictment, error was committed in the trial of the said Peter W. Burns. (fols. 1367-1406.)

3. Whether or not any competent evidence was adduced to prove the crimes charged in the indictment, or to support the judgment of conviction.

4. Whether or not due process of law was accorded petitioner in view of the fact that the judgment was predicated wholly on inferences and suppositions.

5. Whether or not petitioner was deprived of his constitutional right of being confronted by the witnesses against him as a result of the reading into evidence of the testimony of the defendant, JACOBSON, given before the Grand Jury and concerning which petitioner had no opportunity to cross-examine.

6. Whether or not petitioner was denied his constitutional right to a trial according to due process of law, and substantial error committed justifying a reversal of the judgment by reason of the Court's charge to the jury that it might take into consideration circumstances not supported by evidence.

7. Whether or not the conspiracy to transport stolen bonds in interstate commerce may be established by overt acts committed after the bonds had come to rest.

Reasons for Granting Writ.

It is respectfully submitted that the trial of the case before the jury which had listened to the opening of the said Chester G. Bollenbach was not before a fair and impartial jury required by due process of law, and that the said jury should have been discharged by the Court of its own motion and not permitted to decide the case as to Peter W. Burns.

That the admission of testimony of other crimes committed by the defendant Turley over the objection of the said Peter W. Burns and was not evidence admissable against him.

Also that no competent evidence was produced upon the trial to support the judgment of conviction. Instead, how-

ever, despite the constitutional guarantees in favor of every accused, the jury was permitted to predicate its verdict on guess, speculation and inferences unsupported by evidence, and was instructed that it might take into consideration circumstances wholly unsupported by any evidence as the result of which petitioner was denied a trial according to due process of law, and in addition, was denied his constitutional right of being confronted with the witnesses against him and the right to cross examination. All of these errors were substantial, and justified a reversal of the judgment.

Therefore, petitioner respectfully prays that this petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals herein be granted.

PETER W. BURNS,
Petitioner,

By ALEX SIMPSON,
Attorney for Petitioner.

Questions Presented and Statement of the Case.

A statement of the facts and the questions involved will be found in the petition.

Specification of Errors to be Urged.

1. The petitioner-defendant was deprived of, "Due Process of Law", in that he was not tried by a fair and impartial jury, and did not have, "A trial by an impartial jury".

2. Petitioner-defendant was deprived of due process of law, in that evidence was admitted at the trial, of crimes committed by a joint defendant in the indictment, which crimes were not similar to the crime charged in the indictment, and thereby petitioner-defendant was not, "confronted with the witnesses against him."

3. No competent evidence was adduced to prove any of the crimes charged in the indictment, and there was a failure of proof with reference to both the first and second counts of such indictment.

4. Due process of law was denied petitioner-defendant in that the verdict of the jury and the decision of the Circuit Court of Appeals were predicated only on inferences, suppositions, conjecture and guess.

5. The reading into evidence of the testimony of the defendant Jacobson, given before the Grand Jury was a violation of the constitutional right of the petitioner-defendant to be confronted by the witnesses against him and a violation of his right to cross examination.

6. The Court's charge to the jury that it might take into consideration circumstances not supported by evidence, was substantial error justifying a reversal of the judgment, and was a denial of the constitutional right to trial according to due process of law.

7. The evidence wholly failed to establish that petitioner transported or caused the transportation in Interstate Commerce of any securities, or that he knew that any securities had been stolen, or would be transported in Interstate Commerce, has wholly failed to establish that peti-

tioner-defendant was engaged in any conspiracy for such purpose, or that he knew of any existence of such conspiracy, or that he did anything in furtherance thereof.

8. That attempted proof of the commission of Overt acts subsequent to the time when the securities in question came to rest, was wholly improper, since such acts could not be in furtherance of a conspiracy, inasmuch as the conspiracy to transport in Interstate Commerce must necessarily have terminated when the bonds came to rest in New York.

SUPREME COURT OF THE UNITED STATES.

October Term, 1943.

PETER W. BURNS,
Petitioner,
versus
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

The opinion rendered by the United States Circuit Court of Appeals for the Second Circuit is set forth in the appendix hereto. No opinion was rendered by the United States District Court for the Southern District of New York.

Jurisdiction.

The statutory provisions under which the jurisdiction of this Court is invoked is Section 240 (2) of the Judicial Code, as amended by Act of February 13th, 1925, and the Act of March 8th, 1934.

ARGUMENT.

POINT I.

The defendant petitioner Peter W. Burns did not have a fair and impartial jury guaranteed him by law.

The defense of the said Peter W. Burns was that he was not connected with Chester G. Bollenbach who had been

identified or who was thereafter identified as being in Minneapolis in the Court House where the stolen securities were. The said Chester G. Bollenbach addressed the jury connecting himself directly with the said Peter W. Burns by denouncing the District Attorney who was trying the case and the Federal Investigator who was in charge of the prosecution accusing them of attempting to influence a woman friend of the petitioner Peter W. Burns.

This voluntary defense by the said Chester G. Bollenbach of Peter W. Burns directly connected the petitioner with the said Chester G. Bollenbach who was thereafter identified as the person who had been in the room where the stolen securities were in Minneapolis, yet the said jury was allowed to continue in the case over the objection of the petitioner Peter W. Burns, after having listened to the said Chester G. Bollenbach's vigorous denunciation of the Government, in defense of the petitioner. Thereafter it was impossible for the said jury to fairly and impartially weigh the evidence. And by reason of this conduct by Chester G. Bollenbach in the presence of the jury, the petitioner Peter W. Burns was deprived of a fair and impartial jury. Galloway v. United States, Advanced Opinions 1943, No. 16, page 1042.

It is respectfully urged that the trial Judge of his own motion should have discharged the jury on the objection of said Peter W. Burns to going to trial before this jury after he was denied a severance from Chester G. Bollenbach and the other defendants. As to separate trials, see: Opinion reported in 7 C.C.A. United States v. Matt Hopt, decided June 30, 1943, in a treason trial in which the Appellate Court held that it was error not to grant a severance. See: Fed. Supp. Vol. 47, No. 11, page 937; "The Supreme

Court has admonished us that, 'The State, whose interes
it is the duty of Court and Counsel alike to uphold, is con
cerned that every litigation be fairly and impartially con
ducted and that verdicts of juries be rendered only on th
issues made by the pleadings and the evidence. The pub
lic interest requires that the Court of its own motion, a
is its power and duty, protect suitors in their right to
verdict, uninfluenced by the appeals of counsel to passio
er prejudice.' New York Central R. Co. v. Johnso
1928, 279 U. S. 310, 49 S. Ct. 300, 303, 73 L. Ed. 706. Se
also, Price v. Mullen, 1936, 247 App. Div. 532, 228 N. Y. S
828; Cherry Creek National Bank v. Fidelity & Casualt
Co. of New York, 1924, 207 App. Div. 787, 202 N. Y. S. 61
Bagully v. Morning Journal Association, 1899, 38 App
Div. 522, 56 N. Y. S. 605; Zemliansky v. United Parc
Service, Inc. 1940, 175 Misc. 829, 24 N. Y. S. 2d 672, an
cases there cited.'' United States v. Certain Lands, etc., 4
F. Supp. 934.

Right to a severance is a valid right although ordinaril
in the discretion of the Court. If the same is not grante
the Appellate Court will consider the exercise of the di
cretion of the trial Court.

As to prejudice or manner in the conduct of a trial, th
Supreme Court of Michigan in the case of Secrist v. Cit
of Detroit, 299 Mich. 393; 300 Northwestern 137, held tha
there was no hard and fast rule, but the principle was ge
eral, as to a jury trial it must be held in an atmosphe
of judicial calm, so says American Jurisprudence, Vo
14, page 853, section 130; the right to a jury trial is san
as known at law and cannot be taken away; America
Jurisprudence, Vol. 31, page 585, section 36, and case
cited.

U. S. v. Glasser, 86 Advanced Sheets, U. S. Su
Ct. page 406, headnote 22.

POINT II.

Testimony was admitted over the objection of Peter W. Burns showing the alleged commission of a series of crimes alleged by the defendant Turley.

These crimes were of different nature but mainly had to do with the reception and disposal of stolen goods. With these crimes the petitioner Peter W. Burns had nothing to do. And it is respectfully submitted that although there is authority for the admission of testimony of other crimes of a like nature as against a defendant on trial, yet there is a reasonable limit as to the admission of such testimony and certainly there is no warrant in law for admitting the testimony as to crimes not committed or connected with the petitioner Peter W. Burns. (fols. 1367-1406.)

The following cases are authority for the admission of testimony of similar crimes yet they are not authority for the admission of such testimony as to a joint defendant unconnected with the commission of the alleged crimes.

And it is respectfully submitted that the admission of such testimony was error for the jury. See following cases:

As to the admission of crimes other than the one charged in the indictment; see Bishop's Criminal Procedure second Edition, paragraph 1120-1129; paragraph 1124 is as follows: "Even where offenses are of a like sort, evidence to one is not ordinarily admissal in proof of another, as for a trial in larceny, to show that the defendant committed other and disconnected larceny; or, for riot, that he has been engaged in other riots; or for the murder of par-

ticular persons, that at another time and place he murdered or threatened another person; or, for burglary in one County, than he committed the like in another. Hence *A fortiori* distinct crimes of other sorts than the one on trial are inadmissable.'' Note 79 at bottom of page.

In the case under discussion the evidence objected to is practically that of receiving stolen goods by a defendant other than Peter W. Burns, petitioner, which testimony was given by convicts. Such testimony did not prove even that the joint defendant against whom such evidence was given, was guilty of transporting stolen securities in Interstate Commerce. Also in this connection, see: Jones v. People, 44, Colorado 535; 16 Annotated cases 787; McCormick v. United States, 9 Fed. 2d 237, as to what kind of similar crimes can be proved and the effect thereof. (fols. 2482-2483.)

It is also urged that the evidence when admitted, was incorrectly characterized as to effect by His Honor, the trial Judge. Also General Digest, Criminal Law, subtitle 673, (5) collects cases as to other crimes that can and cannot be proved.

POINT III.

The evidence was wholly insufficient to establish the commission of the crime alleged in the indictment, and the verdict of the Jury and the decision of the Circuit Court of Appeals were predicated solely upon inference, guess, conjecture and surmise.

Under the first count of the indictment petitioner is charged with transporting or knowingly causing stolen

bonds to be transported in interstate commerce. The proof, however, wholly failed to establish that petitioner either transported or caused the transportation of such bonds or even knew of their existence.

Despite the length of the record, the proof with reference to the indictment itself is very brief. In April, 1937, the Clerk of the United States District Court in Minneapolis discovered that certain bonds were missing from the files, which bonds had previously been seen in January, 1935. There was no evidence that the bonds were in the files during the intervening period. In January, 1937, it is claimed a man, who was later identified as Bollenbach, made an examination of the files in which the bonds were supposedly contained.

Insofar as petitioner is concerned, the only proof in the record is that in January, 1937, he was in Minneapolis and that he returned to New York some time in February, 1937; that he had been away from New York for some two and a half months, and that during his absence, while in Chicago, he made a telephone call to defendant, TURLEY, which he claimed was in connection with some stockholders' lists.

There is no proof that petitioner examined the files where the bonds were supposedly contained; that he knew BOLLENBACH was in Minneapolis, or had examined the files; that he saw BOLLENBACH while in Minneapolis; that he knew that any bonds were contained in the file, or that they had been taken therefrom. There was likewise no proof that he had ever discussed the bonds in question with either BOLLENBACH, TURLEY, or any other defendant, or that he did anything in connection with such bonds.

Despite this thin proof the jury was permitted to indulge in guess, conjecture, speculation and inference in

order to arrive at a verdict. The Circuit Court of Appeals in its decision, likewise, indulged in inference and speculation, and reading of the opinion in that Court will disclose that inferences were the sole basis of the judgment of conviction and the decision of the Circuit Court of Appeals. That has never been the law.

It has been held on numerous occasions that in order to justify a conviction on circumstantial evidence, it is necessary that the directly proven circumstances be such as to exclude every hypothesis but that of guilt. *United States vs. Russo,* 123 F. 2nd 420 (3 C. C. A.).

In *Rosenberg vs. United States,* 120 F. 2nd 935, the Tenth Circuit Court of Appeals held:

> "* * * But an inference of fact which is essential to the establishment of the offense cannot be rested upon another inference. Conviction cannot be predicated upon one inference pyramided upon another. Presumption cannot be superimposed upon presumption and thus reach the ultimate conclusion of guilt. *United States v. Ross,* 92 U. S. 281, 23 L. Ed. 707; *Vernon v. United States,* 8 Circ. 1146 F. 121; *Brady v. United States, supra,* (24 F. 2d 399); *Mackett v. United States, supra,* (90 F. 2d 462)."

The Court of Appeals of the State of New York in *People vs. Weiss,* 209 N. Y. 160, stated the law to be:

> "* * * The prosecution relied upon circumstantial evidence to establish both those facts. In such circumstances, the facts from which the inferences are to be drawn must be established by direct proof; the inferences may not be based upon conjecture, supposition, suggestion, speculation or upon other inferences; the conclusion sought must flow naturally from the proven facts and be consistent with them all; the proven facts must exclude to a moral certainty every hypothesis except that of guilt or of the offense charged, and not alone must all the proven facts be consistent with and

point to guilt, but they must be inconsistent with innocence (People, &c., v. Fitzgerald, 156 N. Y. 253; People, &c., v. Razezics, 206 N. Y. 249; People, &c., v. Woltering, 275 N. Y. 51). They are of no value if consistent with either the hypothesis of innocence or the hypothesis of guilt. It is not enough if the hypothesis of guilt will account for all the facts proven." (People v. Suffern, 267 N. Y. 115, 127.)"

The proof in the case is wholly insufficient to prove as a matter of law beyond a reasonable doubt that petitioner had anything to do with either the theft or transportation of the bonds. The record is further barren of any proof as to who actually stole the bonds and transported them to New York, although, by inference, the Government sought to establish that BOLLENBACH took them from the files in Minneapolis.* In any event no claim was ever made that petitioner took the bonds.

The facts adduced as to petitioner are, we submit, as consistent with innocence as with guilt and cannot form the basis of a conviction. Before any conviction may be had, Section 415 of Title 18 of the United States Code, some criminal act by petitioner in connection with the transportation of the securities must be proven. This the government failed to do.

In McAdams vs. United States, 74 Fed. 2d 37, the defendant was charged with a violation of Section 408 of Title 18, United States Code. Although relating to motor vehicles, it is similar to the statute herein involved. The Court there held:

"The Government offered no evidence to show who stole the cars, who transported them, when they arrived in Arkansas, or through whose hands they passed before they reached the defendant * * *."

In the case of *Wolf vs. United States,* 36 Fed. (2nd) 450, the Court stated:

> "In the instant case, there is not a scintilla of evidence to suggest that either defendant stole the car or that either defendant knew of the car's existence until it was in Indianapolis."

Before a judgment of conviction can be sustained, it must be established beyond a reasonable doubt that the petitioner either transported the stolen bonds or, knowingly, caused them to be transported in interstate commerce. No such proof was here presented. Instead, inference, guess and conjecture were indulged in to arrive at the conclusion that merely because petitioner may have been in Minneapolis about the time the Government claimed the bonds might have been stolen that he had some connection with their transportation. This, we submit, is not due process of law.

POINT IV.

The Government wholly failed to establish that petitioner engaged or participated in any conspiracy to transport stolen bonds in interstate commerce.

Under the Second count of the indictment three overt acts are alleged for the purpose of establishing a conspiracy to transport stolen securities in interstate commerce. No proof was offered to connect petitioner with either the first or second overt acts. The third overt act alleged that petitioner attended at the office of defendant, TURLEY, on or about February 11th, 1935, and there had a conversation with certain other defendants.

Even if the testimony with reference to this third overt act be believed, it would be insufficient to establish the

participation by petitioner in any conspiracy as charged. The record establishes beyond doubt that the bonds in question must have been in New York on the 3rd day of February, 1937, at which time ten were delivered to Hart Smith & Company for sale, and a check therefor delivered to Arnold Berendson. The remaining 15 bonds were delivered to Ingalls and Blaser for sale no later than February 5th, 1937, so that any conspiracy to transport bonds in interstate commerce that may have existed must necessarily have come to an end no later than February 5th, 1937.

The record is likewise devoid of any evidence that petitioner had any knowledge of the existence of any conspiracy to transport stolen securities in interstate commerce. Even if it be assumed that the testimony with reference to a meeting on February 11th be truthful and that petitioner then learned of such a scheme, there would still be no evidence that petitioner engaged or participated in any conspiracy or knew of the existence thereof.

This Court in *United States vs. Falcone*, 311 U. S. 205, 210, said:

> "And they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy.
>
> "The gist of the offense of conspiracy as defined by Sec. 37 of the Criminal Code, 18 U. S. C. Sec. 88 is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. Pettibone v. United States, 148 U. S. 197; Marino v. United States, *supra* (91 Fed. (2d) 691; Troutman v. United States, 100 F. (2) 628; Beland v. United States, 100 F. (2d) 289; of Gebardi v. United States, *supra* (287 U. S. 112-121). Those having no knowledge of the

> conspiracy are not conspirators, United States v. Hirsch, 100 U. S. 33, 34; * * * and one who without more furnished supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge."

It is urged that there is nothing in the record to show that petitioner in any way participated in the crime of transportation, as alleged in the indictment, or that he was a party to, connived in, or had any knowledge of either the transportation of the securities or of the persons who did the transporting, or that he took any part in any of the arrangements for the transportation of such securities, or that he in any manner, knowingly, caused the transportation.

The Second Circuit Court in *Gable vs. United States,* 84 Fed. 2nd, 929, a case where the proof was much stronger than here presented, held:

> "Nor is there any proof of conspiracy upon the part of appellant to transport in interstate commerce stolen property. The record is devoid of any evidence that appellant had any understanding or agreement, tacit or otherwise, looking toward the stealing of the bonds, transportation of the same, or delivery of the same after transportation. The only proof is that after the bonds had been stolen and transported and delivered to him, he agreed, for a commission, to dispose of the same. This is not proof of the conspiracy charged. With what his guilty may be under the statute of Illinois governing criminal offenses, we are not concerned. There being no evidence of a commission of a federal crime, the judgment is reversed."

In *DeLuca vs. United States,* 299 Fed. 741, in the Circuit Court of Appeals, Second Circuit, the Court said:

"* * * The overt act must be one which tends to further the conspiracy. If not, it is not an overt act, no matter what it may be called. It is the character of the act which is the determining factor and classifies it. It is not the same which it may be called. The object of the conspiracy charged was obtained as soon as the opium was out of the bonded warehouse. It was then that the government's lien on the opium was gone. It had been defrauded, and the conspiracy was ended. No act can further the conspiracy which transpires after the end of the conspiracy. Feder vs. United States, 257 Fed. 694, 168 C. C. A. 644, 5 A. L. R. 370; Lonabaugh vs. United States, 179 Fed. 476, 103 C. C. A. 56.

"This overt act of sale, as alleged and as pleaded in the indictment, was not in furtherance of the conspiracy to defraud the customs duties. * * *"

The authorities agree that anything moving in interstate commerce loses its interstate character when it crosses State lines and comes to rest in the State where it was shipped or transported. A conspiracy, therefore, to violate 18 U. S. C. Section 415 could not even include a sale as an overt act, any more than it could include discovery, gift or other disposition of the securities after the transportation was completed.

In Susquehanna Coal Co. vs. Mayor, etc., 184 Fed. 941, the Court said:

"Assuming, but not deciding, that the coal in question, before it was dumped into the storage yard at South Amboy, was 'Interstate Commerce.' I am satisfied that under the authorities, in the circumstances, and the purposes of its subsequent storage at South Amboy, it lost its character as 'interstate commerce', and became a part of the general mass of the property in New Jersey subject to taxation. The coal in storage was the property of the complainant. It had not been sold or set aside to any purchaser. It was there not because the carriage to any particular consignee had been interrupted by any of a number of causes that

> may occur in transportation, but because it had reached its destination—not the ultimate, but the intermediate destination. It had been consigned to South Amboy to the shipper's own order, and its storage was for the benefit of the shipper, and not the carrier. It was undoubtedly intended to go further, but not on that carriage. It was there at rest, no longer in transit, and could, at the will of the shipper, be forwarded to any point within as well as without the state. * * *"

United States v. McGuire, Circuit Court of Appeals New York, 64 F. (2d) 485 involved the transportation in interstate commerce of lottery tickets in violation of 18 U. S. C. A. 387, forbidding the transportation in interstate commerce of lottery tickets. The tickets were printed at Scranton, Pa. They were shipped, when printed, to Philadelphia, where they were placed in packages and shipped by express to various states. The particular tickets discussed were shipped to one Finn at Middletown, New York,

> "After the tickets, though they had been sent from Pennsylvania to New York, were received from the interstate carriage in New York, they were no longer in interstate commerce. Sonneborn Bros. v. Cureton, 262 U. S. 507, 43 S. Ct. 643."

It is respectfully submitted that the proof wholly failed to establish that petitioner engaged or participated in any conspiracy, that he committed any overt act in furtherance thereof, or that he had any intent whatsoever to engage in any such conspiracy.

POINT V.

The Court's Charge to the Jury was so prejudicial as to deprive petitioner of a fair and impartial trial and to deprive him of his constitutional right to a trial according to due process of law.

The Trial Court, in charging the jury on the question of conspiracy, advised them that they might take into consideration circumstances which were wholly unsupported by any evidence and based upon such circumstances, find the defendants guilty. This was so prejudicial and detrimental as to deprive him of a fair and impartial trial. The portion of the Judge's charge referred to is set forth in the petition, and for that reason is not here reported.

This Court in *Quercia v. United States,* 289 U. S. 466, held:

> "The judge may not however, usurp the functions of the jury; and if his instructions may fairly be said to have been coercive upon the jurors in their consideration of facts determinative of their conclusions upon the question of guilt, the charge is erroneous even though in form it is an expression of the Court's opinion and the jurors are told that, after all they are to determine the facts. This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled but judicial to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of witness. He may analyze and dissect the evidence but he may neither distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. *The influence of the trial judge on the jury 'is necessarily and properly of great weight and his lightest word or intimation is*

> *received with deference, and may prove controlling.'* This Court has accordingly emphasized the duty of the trial judge to use great care than an expression of opinion upon evidence 'should be so given as not to mislead, and especially that it should not be one-sided' *that deductions and theories not warranted by the evidence should be studiously avoided. Starr v. United States,* 153 U. S. 614, 626; *Hichong v. United States,* 160 U. S. 408, 421-423. *He may not charge the jury 'upon a supposed or conjectural state of facts, of which no evidence has been offered. United States v. Breitling,* 20 How. 252, 254, 255.''

We submit that a fair and impartial trial was denied petitioner, and that by reason of the inflammatory and prejudicial charge to the jury, coupled with the fact that they were permitted to indulge in conjecture, inference and surmise in arriving at a verdict, that due process of law was denied to petitioner.

POINT VI.

The Trial Court committed reversible error in permitting testimony of the defendant, Jacobson before the Grand Jury to be read into evidence.

Despite the fact that every accused is guaranteed the right of being confronted with the witnesses against him under the Sixth amendment of the Constitution, petitioner was denied this right and likewise the right to cross examine, by reason of the fact that there was read into evidence the testimony given by the defendant, JACOBSON, before the Grand Jury.

Despite the fact that the Trial Court admitted such testimony only as against JACOBSON, it contained prejudicial statements against petitioner, concerning which he had no opportunity to cross examine. Timely objection

was made. (fols. 937, 938.) This testimony, despite the fact that it was admitted only as against JACOBSON, could not help but prejudice the rights of petitioner.

Although petitioner was not required to explore the minds of the jurors in an effort to prove that it did influence their verdict, (United States vs. Dressler, 112 Fed. 2d. 972; Coulston vs. United States, 51 Fed. 2nd, 189) we submit that the jury was affected by it, and that in reaching its verdict it, undoubtedly, took such testimony into consideration.

We further submit that even the Circuit Court in reaching its decision took into consideration as against petitioner evidence which had been admitted only as against TURLEY, when it referred to testimony that TURLEY had told Blaser and Ingalls in April, 1937, that BURNS had stolen the bonds. This in spite of the fact that there was no evidence or contention that petitioner took the bonds from the Courthouse.

We submit that petitioner was here denied a fair and impartial trial according to due process of law and that he was convicted as a result of accumulation of prejudicial errors and by reason of the fact that inferences, guess and conjecture were indulged in, rather than upon legal evidence, and that he was denied the right to cross examine witnesses against him and of being confronted with such witnesses; and that there was no legal evidence whatsoever to support the judgment of conviction.

Conclusion.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALEX. SIMPSON,
Attorney for Petitioner.

APPENDIX A.

Decided May 19, 1943

Argued April 16, 1943

U. S. PLAINTIFF APPELLEE
vs
GEORGE A. TURLEY ETC.

Appeal from a judgment of the District Court for the District of New York by George A. Turley and Peter W. Burns. They were convicted under #18 U. S. C. A. 415 and under 18 U. S. C. A. 88 after trial by jury affirmed, before Augustus N. Hand, Chase and Clark Circuit Judges.

Chase Circuit Judge

George A. Turley and four others were indicted for transporting or causing to be transported in interstate commerce securities theretofore stolen and of a value in excess of $5,000 in violation of 18 U. S. C. A. 415. The indictment also contained a count charging conspiracy to violate the above statute contrary to 18 U. S. C. A. 18.

A severance was granted to one defendant; two others pleaded guilty and a fourth was convicted with Turley and Burns but only these two have appealed.

It was discovered sometime in April of 1937 that twenty-five gold notes attached to proofs of claim in the reorganization proceeding of the Minnesota and Ontario Paper Company had been stolen from the files of the U. S. District Court at Minneapolis, Minn. At the time of the stealing,

appellant Burns was in the business of obtaining and selling lists of stockholders and was specially interested in lists showing the names of stockholders of companies in the process of reorganization.

He operated his business under the name of Bond and Share List Company, 15 William St. New York City. Turley, an attorney practising in New York City, was also interested in obtaining such lists and there was evidence showing that he and Burns had been acquainted since as early as 1935.

Burns and another defendant Bollenbach were shown to have been at the United States District Court House in Minneapolis in the latter part of January 1937 and it was proved that Bollenbach had been examining the files where the gold notes which were stolen were kept. Burns likewise admitted that he had telephoned Turley in New York while he was enroute either to or from Minneapolis; and although he testified that the purpose of his call to Turley was to obtain the address of another Turley in Chicago who dealt in stockholders lists the jury did not have to believe that, but might well have inferred that the conversation was about these gold notes.

Sometime early in February of 1937 Bollenbach returned to New York City rented an office at 15 E. 40th. Street under the alias of Berendson and tried to dispose of ten of the gold notes which had been stolen in Minneapolis. There was evidence that placed Burns in this office at least ten times in the short period, Bollenbach used it. Bollenbach's attempt to sell ten of the notes proved unsuccessful when Hart Smith & Co., through whom he tried to make the sale grew suspicious and stopped payment on its check

which had been made out and delivered to Berendson for the bonds and on which there appeared only a typewritten endorsement in that name when Berendson tried to open a checking account by depositing the check in a bank. Thereafter Bollenbach made efforts through another defendant; Jacobson, to effect either the return of the notes or the cashing of the check but he was unsuccessful.

While these negotiations were going on, Bollenbach through Turley disposed of the remaining fifteen notes. This was accomplished with the aid of the defendants Blaser and Ingalls who were called to Turley's office and to whom Hurley introduced Bollenbach as "Mr. Brown." At Turley's suggestion a fictitious sale was put through Blaser and Ingalls as though in the regular course of business and made to a "Walter T. Roberts." after which they disposed of the notes through A. E. Ames & Co. on the strength of a letter, brought to them by Bollenbach, which purported to give them authority to make the sale. Blaser then cashed the check of Ames & Co. which was made out to "Roberts" after guaranteeing the endorsement in that name. Ingalls testified that he took the money to Turley's office where some sort of division was made.

Turley, Burns and Bollenbach were all present. Later in April 1937 Turley told Blaser and Ingalls that Burns had stolen the bonds in Minneapolis according to testimony which was admitted against Turley.

There was likewise evidence that Turley and some of the other defendants had been involved in similar transactions for the disposition of securities which had either been stolen or obtained by fraud.

The appellants claim that error was committed in that there was not enough evidence to support the verdict. In that the court committed error in charging the jury and in that the court acts alleged and proved left the crime charged still unproved as the statute requires because they occurred after the notes had come to rest in the State of New York and after they had lost their interstate character.

We think for the reasons about to be given, that there was enough evidence for the jury to have found as it did that these appellants either transported or caused to be transported, in interstate commerce, securities which were known to have been stolen; and we are also satisfied that the jury was justified in finding that they conspired to do so.

Burns and Bollenbach were both in Minneapolis in January of 1937 and Burns admitted he had been in the Court House from which the notes were stolen. Bollenbach was not only seen there, but also had access to the files wherein the notes were kept. That the jury was justified in concluding that they were to steal the notes if they could and take them to New York is adequately clear. Their continued association after Bollenbach returned to New York and was trying to dispose of the securities tied them well enough together in this business. Burns was not only seen at the office maintained by Bollenbach under the name of Berendson, but he was also seen by Ingalls to have taken some of the proceeds of the sale made through Blaser and Ingalls. This evidence not only supported an inference that Burns conspired to transport the stolen bonds or cause them to be transported from Minneapolis to New York, but it also justified the conclusion that he participated as a principal in the substantive crime charged. Furthermore, his co-

operation in the disposal of the notes tended to show that he acted with a guilty knowledge of the whole transaction from start to finish. U. S. V. Seeman, 115F (2) 371. There was also proof that Burns was in touch with Turley by telephone which well might have been treated as highly indicative of their then participation in the common venture even though Burns explained that his call had another and an innocent purpose. Indeed the jury might well have inferred that they were participating in the substantive crime charged as well as the conspiracy. Bearing on this is the corroborative evidence that Turley dealt with the stolen notes after they had reached New York. That he had before been engaged in similar transactions with some of the conspirators; one of which involved the stealing of securities by Bollenbach from the U. S. District Court at Wilmington, Delaware to be sold in New York, and that he had told Blaser and Ingalls that the notes had been stolen by Burns (U. S. v. Seeman) The evidence consequently was substantial in support of the verdict as to both Burns and Turley.

The appellants objected to the charge of the Court to the effect that they might be convicted under 18 U. S. C. A. 415 if they were organized to dispose of stolen securities; were willing so to do, and cared not where the property came from, either within or without the State. An exception was taken to this charge although no reason for the exception was given. The theory of such a conviction as stated in the charge is "that by furnishing a market for such stolen property he (such person) thereby caused bonds in another State to be transported to New York." Under the circumstances that was a fair statement of the rule set forth in United States v. Crimmins, 123 F. (2) 271, 273. There it was pointed out that an agreement to take and dispose of

stolen securities, whether or not some of them came from without the State would support a conviction for conspiracy to transport stolen securities in Interstate Commerce in violation of 415, Title U. S. C. A. Relevant to the existence of such an agreement was the evidence of Turley's similar transactions, such as the one in Delaware, that Turley and Burns were in touch with one another by telephone; and that Turley and Burns participated with Bollenbach in the disposal of the notes in New York. The court in substance charged this when it said "A continued indifference to the source of the bonds, coupled with the knowledge that they had come beyond a State, would be some evidence of such an agreement." It was not an error to follow the Crimmins case this way.

The appellants also insist that it was erroneous to charge the jury as follows:

"It is not necessary at all for Turley or Jacobson to be out in Minneapolis at all. In saying what I am about to say, please do not feel that I am expressing any view held by myself, but I am trying to illustrate to you. Let us say for example Turley agreed to finance Bollenbach and Burns in going out to steal these bonds in Minneapolis, knowing that they were there in the Clerks Office. He would be as guilty then if they brought back the bonds to Turley in New York as if Turley was out in Minneapolis, because they would be acting for him in his work.

"It is not for me to say, and I don't mean to indicate, as I said a moment ago, that that was a fact; but you are entitled to take all these circumstances into account in coming to a conclusion whether this is a planned theft or transportation of these bonds."

When one of the attorneys objected to this illustration the Court again disclaimed any intent to charge that Turley had in fact, financed the trip and said, "I don't say he did". The appellants, however argue that this was error in that the Court charged the jury on facts that did not exist; and it was error of course, if the court went so far as to usurp the functions of the jury. (Quercia v. U. S., 289 U. S. 466). Nor could the Court make deductions or advance theories which were not warranted by evidence. (U. S. v. Brietting, 20 HOW 252.) But here the Court was not doing that but merely indicating by way of illustration that Turley might be guilty of the substantive crime of causing the transportation of stolen securities in interstate commerce even though he remained in New York. That was, of course, a fair statement of the law. Furthermore, it is a stretch to say that the use of this illustration in connection with a proposition of law was such an unfair comment as to warrant a reversal on the theory that the use of it brought about the conviction of the appellants. (See Allis v. U. S., 155 U. S. 117, 123; Luteran v. U. S., 93 F. (2) 395, 401.

In view of the sufficiency of the evidence to support the verdict as above indicated both as to transportation and conspiracy, it is immaterial when, if ever, the notes ceased to be in, interstate commerce before the conspirators disposed of them.

Affirmed.

APPENDIX B.

UNITED STATES OF AMERICA
vs.
GEORGE A. TURLEY, *et al.*

December 4, 1941.

Mr. Hawthorne: On behalf of the defendant Bollenbach, as your Honor knows, an application for an adjournment was made last Monday for an adjournment of one month. Mr. Bollenbach stated that he had retained Mr. Fennelly. Mr. Fennelly called me yesterday afternoon and said he would be unable to appear and try this case for Mr. Bollenbach unless it was adjourned for one month.

The Court: The case was set for today and we will proceed to impanel a jury and take the opening statements and then adjourn the taking of testimony until Monday morning at 10:30.

Mr. Bollenbach: Your Honor I have no attorney representing me to defend me this morning.

The Court: Well, you should have one.

Mr. Bollenbach: I engaged Mr. Fennelly and he cannot be here and I have no attorney.

Mr. Reis: Mr. Hawthorne has never told me that he has withdrawn, and Mr. Fennelly told me last night that he is not in the case. Mr. Hawthorne has heretofore been retained and paid, and so far as I know he is in the case, at least he knows the case, and I ask that your Honor assign him to this case for this morning.

The Court: Yes, I will assign Mr. Hawthorne to represent Mr. Bollenbach.

Mr. Simpson: I would ask your Honor if there is to be a trial today that I be granted a severance for Mr. Burns.

The Court: You have appeared for Mr. Burns?

Mr. Simpson: Yes, sir.

The Court: The testimony will not start until Monday.

Mr. Bollenbach: May I make a motion on the ground that I engaged counsel and that my counsel cannot be here, and I am without counsel? There is going to be murder charged in this case, and I don't see why I should not be represented by an attorney.

The Court: You have had plenty of opportunity, and the Court has appointed Mr. Hawthorne.

Mr. Bollenbach: This is the first time that I have asked for a postponement of the case. The case has been coming on since last January, and every time it was postponed because the government asked for it.

The Court: I cannot adjourn the case now.

Mr. Bollenbach: May I take up an exception? And am I to go on trial without an attorney?

The Court: I have assigned Mr. Hawthorne to represent you.

Mr. Bollenbach: I do not want Mr. Hawthorne and do not think he is competent to handle the case, and under the circumstances I am going to trial without an attorney.

The Court: Most certainly you are not at all.

Mr. Bollenbach: I beg your Honor's pardon.

Mr. Sager: I would like to move to compel the district attorney to elect between the two counts of the indictment on the ground that the evidence which may be adducible on one count might be of no effect on the other, and I make the same motion as to the second and third counts.

The Court: The motion is denied.

Mr. Hawthorne: In view of Mr. Bollenbach's statement I would move that I be allowed to withdraw from the case.

The Court: Your motion is denied.

Mr. Hawthorne: Exception.

The Court: Call a jury.

(A jury was duly impaneled and sworn.)

* * * * *

The Court: Do you desire to say anything to the jury, Mr. Bollenbach?

Mr. Bollenbach: I am representing myself, sir.

The Court: Do you have anything you wish to say?

Mr. Bollenbach: I will prove that I was on a trial in Philadelphia in the Circuit Court of Appeals, by competent attorneys from the State of New Jersey, and never as Mr. Milenky and Mr. Keating and Mr. Reis is trying to put me, in Minneapolis. I have never been in Minneapolis. I don't know what it looks like, and I will produce three of the largest law firms who were trying a case of reorganization for me, and I will make monkeys out of Mr. Reis and his cohorts who now are practicing fraud on this Court, and deceit, and crime, and conduct prejudicial to my getting a fair trial right here. Furthermore, I might say, your Honor, that the Federal Criminal Code takes into consideration securities over $5,000. The actual value of these securities—I might give Mr. Reis a good steer here and he might look at list 29, which says that the original value of these securities put out by the Minnesota and Ontario people were a fraud on the stockholders, and the value wasn't 75 million, but was $25,500,000. The Government says that when the corporation originally issued those securities they defrauded the bondholders. Taking that into consideration the true and marketable value was less than $5,000. Now Mr. Reis can find that in Schedule 29 in the reorganization. So taking that into consideration the true and marketable value was less than five thousand. Now there is not a deviation between whether the market value should be taken into consideration or the face value of the bonds that were originally issued—they were fraudulent. You must not lose sight of the fact, was the value

of the bonds twenty-five thousand or was the value less than five thousand. I say to you folks of the jury if they were less than five thousand they are licked on their own evidence.

Now who are these people who are going to testify against the defendants? Every one of them has admitted their guilt in other cases. I will produce to you character witnesses of standing like such as Frank Ferguson of the Port Authority, and Mr. Keating and Mr. Milenky can interview them and browbeat them if they have the nerve to and want to. I understand that Mr. Milenky has charged—

Mr. Reis: Now—

Mr. Bollenbach: Wait a minute.

The Court: Proceed.

Mr. Bollenbach: I am going to prove that Mr. Milenky took a young lady and browbeat her and told her, said to her that he would prove that she and some other witnesses had had sexual intercourse together; that Mr. Burns was keeping company with another young lady, and this young lady was accused that Mr. Burns was bruiting all over the street that he had been banging her. That is the kind of evidence that you may have introduced here into court; and I will tell you that just because the Government is presenting this case to you don't think that the defendants haven't some rights.

Furthermore, the reason I couldn't get an adjournment this morning is quite laughable—Judge Knox doesn't know this, but I will tell him now, that he has been taken advantage of here this morning; he doesn't know it. By whom? Mr. Reis, Mr. Milenky, Mr. Keating. And why? They sprung on him, "Your Honor, we can't give this adjournment because the Government has been to such great expenses." Now I will tell you what to do with them—talk

about Hitler? Hitler is a gentleman compared to some of the crap these brutes are playing off here.

The Court: Mr. Bollenbach, you will have to use decent language in this court.

Mr. Bollenbach: They used to parade us up and down like a bunch of sheep, and then they would bring a clerk of the court from Minneapolis to identify us as defendants. They did that not once, they used to parade us up and down. We didn't have to stand up, because we knew the racket that was going on. Mr. Reis would say, "Are the defendants in there?", and we would have to parade up and down like sheep being led to slaughter. Those are the kind of tactics you are going to see here in this case from Mr. Reis. They want to convict us.

Are you married? Are you folks on the jury married? Just think of one fact—since I have been apprehended in this court I have had a little girl born to me, and she is now 17 months old, and that is the reason I am fighting here. They at no time can implicate or complicate me in Minneapolis. And I say to them right now, let's reverse this trial once. Let's do just a little different. I will put my case on and if they can find me in Minneapolis, I will take the rap. I will put my character witnesses and all my witnesses on first and I will show every day where I was in the month of January and in February, and I will make them look like monkeys. They don't dare do it, because they are going to try to build this case up with innuendo. They haven't a case, and they are trying to make a case.

The Crimmins case that has just been decided, in that case they say—

The Court: You are going outside of the evidence that you intend to present here.

Mr. Bollenbach: The Crimmins case says—

The Court: We don't care about that at this time.

Mr. Bollenbach: There has just been a case handed down by the Circuit Court of Appeals—

The Court: Just confine yourself to this case.

Mr. Bollenbach: All right. The law says then—

The Court: No, no. It make no difference now what the law says. I will determine the law in this case. You are trying to evade what I am telling you.

Mr. Bollenbach: I don't want to fence. I would very much dislike to file an affidavit of prejudice against your Honor.

The Court: Go ahead and file one if you want to.

Mr. Bollenbach: You are not permitting me the right of hiring a lawyer, which I think I am entitled to.

The Court: You have counsel to advise you.

Mr. Bollenbach: I have no counsel. I will show you a check payable to Leo C. Fennelly—

The Court: We do not care about that at this time.

Mr. Bollenbach: —that is sufficiently large enough to hire counsel for me, and you are refusing me that right.

The Court: Mr. Hawthorne, when were you retained in this case?

Mr. Hawthorne: A year and a half ago.

The Court: Were you paid a fee?

Mr. Hawthorne: Part of my fee.

The Court: And you have consulted with the defendant from time to time?

Mr. Hawthorne: A number of times, yes, sir.

The Court: When was Mr. Fennelly first consulted in the case?

Mr. Hawthorne: In May of this year.

The Court: He first appeared in court last week.

Mr. Hawthorne: As far as I know that is true.

Mr. Bollenbach: Mr. Fennelly has been engaged in May

of 1941. This case was moved for trial so often that I commenced to get grey hair.

The Court: Proceed.

Mr. Bollenbach: As I was detailing to you before, Mr. Reis beyond a reasonable doubt has got to prove that I had definite knowledge and participated in the stolen bonds in Minneapolis according to the decision that was handed down by the Circuit Court of Appeals on December 3rd. According to that decision there can be no ifs or ands. He has to prove my being in Minneapolis. I defy him to do that, and I defy him to put me on the stand and let me account for every day. I will make a monkey out of him and he knows it.

And I want to make a motion right now that my case be severed from the rest of these defendants now, or that this matter be postponed until Mr. Fennelly has an opportunity to finish his anti-trust case which would be to the middle of January.

The Court: Your motion is denied.

Mr. Bollenbach: I take an exception.

* * * * *

(After the jury retired the following took place):

Mr. Ziegler: In the absence of the jury and on behalf of the defendant Turley I would like to move for a severance, and I think the performance that is still fresh in the Court's mind will cause the Court to agree with me almost beyond a doubt, that there can be no fair trial to any defendant in this case unless he stands trial alone and not encumbered with any statements which may or may not be biased or prejudicial, but which certainly add nothing to the proper conduct of a lawsuit.

Mr. Sager: I join in that motion.

Mr. Ziegler: I would like to suggest that the defendant Bollenbach having asked for a severance, if the Court

doesn't want to order four separate trials, then I will join with Bollenbach in asking that his severance be granted.

Mr. Reis: I don't see why the Government should be penalized in this case. This man has had counsel right along, and I think the Court is quite capable of keeping him within the bounds of propriety.

Mr. Sager: You cannot dissipate the foul atmosphere that has already been created.

Mr. Simpson: I have no comment. I asked for a severance and your Honor refused it, and I am here to go to trial. I do not think that we are helped at all by what has occurred, but we have to be tried and that is all there is to it.

The Court: I think the exhibition this morning was quite uncalled for, and I will consider whether or not I will grant a severance. And I will consider also the question of contempt.

Mr. Bollenbach: I do not want to offend you or this Court, your Honor.

The Court: You offended the jury.

Mr. Bollenbach: Well, your Honor, I was a little excited. May I apologize for any remarks that I made this morning that may have been offensive?

The Court: I will consider the matter of whether I will grant a severance.

Mr. Bollenbach: Your Honor must remember I have a little girl I am fighting for.

The Court: That is all right to fight for your little girl. If you come into this Court you will get a fair trial.

Mr. Bollenbach: All I ask is that I be represented by competent counsel.

The Court: You have had a year and a half. The only time Mr. Fennelly appeared was last week when he asked for a month's adjournment and the Court cannot allow its

calendar to be disrupted by counsel called in at the last minute.

Mr. Bollenbach: Mr. Fennelly would have gone on with my case if he could have gotten away from the antitrust case he is engaged in.

And again I want to say to the Court that I am sorry if I said anything to the jury to offend it.

The Court: I warn you now that one more exhibition such as you gave this morning will cause you to be committed to jail for contempt, and you will stay there for quite a while.

Mr. Reis: The Government has been put to a great deal of expense in preparation, and all the witnesses are here in this trial, and we are prepared to go ahead, and if there is a severance it may make it very difficult for the Government to proceed as it has contemplated.

Mr. Ziegler: I wouldn't care if the Government wasted ten million dollars if the result of that was the conviction of one innocent man.

Mr. Hawthorne: I again ask your Honor to withdraw me from the case.

The Court: I will direct you to continue in the case as long as it is before the Court.

UNITED STATES OF AMERICA,
vs.
GEORGE A. TURLEY, *et al.*

New York, December 8, 1941;
10:30 a. m.

Trial resumed.

The Court: Let the defendants come up inside of the rail.

(The defendants complied.)

The Court: I should think perhaps with respect to the motions that were made on Thursday for the severance of this indictment, that the best thing to do is to discharge this jury and take a new jury rather than to sever the defendants.

I want to say in that connection to Mr. Bollenbach that his action on Thursday was, in my judgment, contemptuous and justifies his punishment for that contempt by incarceration. I have no desire to do that providing he behaves himself throughout the rest of this trial. He has now put the Government to a great deal of expense and the Court to annoyance, and has jeopardized the interests of the other defendants, and it must be upon the distinct understanding that the Court will no more tolerate any of the gutter language, Mr. Bollenbach, such as you used here the other day, because if you do repeat what happened the other day, you are going to jail as certainly as you are sitting there now.

Bring in the jury.

Mr. Bollenbach: Your Honor, is it time for motions or not?

The Court: Yes; you can make motions.

Mr. Bollenbach: Are you bringing the jury in now or discharging them?

The Court: Yes.

Mr. Bollenbach: I will make a motion then after the jury is discharged.

The Court: Make your motion then now. What is your motion?

Mr. Bollenbach: My motion is that I wish to present to you as an exhibit a photostatic copy of a check. I will show you that check, sir. You will mark this as an Exhibit No. 1 as presented by Chester G. Bollenbach and reading Leo C. Fennelly, Attorney. That was given to Mr. Fennelly on December 1st to represent me on this trial.

The Court: Did he keep the check?

Mr. Bollenbach: He kept the check and he gave me this check back on Wednesday afternoon after we found out that Mr. Reis would not grant an adjournment, and that he was engaged in an anti-trust suit defending the Hamilton Ice Company. I present his envelope, Leo C. Fennelly, addressed to Chester G. Bollenbach.

The Court: Very well. You have had an attorney for upwards of a year and you come in at the last moment with Mr. Fennelly, and ask that the case be adjourned. The witnesses were collected from various parts of the country for the purpose of going ahead with the trial. You have had plenty of time and you have counsel you obtained over a year ago and with whom you consulted, and there is no reason why you should have an adjournment to bring in an attorney.

Mr. Bollenbach: Mr. Reis, as early as May in 1941, Mr. Reis of the United States District Attorney's office knew and was advised, and he called up Mr. Hawthorne, to Mr. Hawthorne's surprise, that Mr. Fennelly was brought into the trial and was to represent me, and as a result on Tuesday, if I am not mistaken, Mr. Reis told Mr. Fennelly that this case was going to trial, so now the Government cannot raise the question of true facts and it cannot plead surprise; that I was attempting to delay the trial and these indictments, or hinder the prosecution of justice.

The Court: The defendant should have been prepared to go to trial when this case was called for trial. You have had a great deal of experience with attorneys and you could have had an attorney represent you long before the day Mr. Fennelly came into court. Do you want Mr. Hawthorne's representation?

Mr. Bollenbach: No, sir; I do not, sir. May I have Mr. Reis then now read to you, sir, the indictment, and I will

point out to you that this entire thing is concocted by fraud on Mr. Reis's part.

The Court: No.

Mr. Bollenbach: All right. Then I will read the first count of the second indictment.

The Court: No. You won't. The indictment is on file.

Mr. Bollenbach: All right; but just a minute. In his charge to the jury, your Honor, if you had studied the indictment you would have found out that Mr. Reis was lying to you deliberately, deliberately lying to you, and he is going to prove facts that are absolutely immaterial as far as I am concerned.

The Court: The Court will rule on whether or not the facts are material or otherwise. The case proceeds.

Mr. Bollenbach: Again, your Honor, I am making my plea that I am being represented in this trial without the attorney of my choosing.

The Court: It is your own fault that he is not here.

Mr. Reis: May I state for the record that this is the third attorney; that Mr. Samuel Hirschenstein represented this defendant when he was first arrested and filed a notice of appearance, and Mr. Hawthorne then appeared for him, and Mr. Fennelly did not file an appearance unless he knew he could try the case, and Mr. Fennelly stated he would be in it if he could get a proper adjournment to make motions in the anti-trust case. Mr. Hawthorne never filed as counsel representing this defendant, so that for the purpose of the record this defendant did not inform your Honor of that status. Of the three counsel he is talking about, there were two in this case.

Mr. Simpson: I would like to renew my motion that I made for a severance on behalf of Peter Burns, your Honor now having discharged the jury.

The Court: I have not as yet.

Mr. Simpson: As a result of what happened, which I need not repeat, my client cannot safely go to trial with Mr. Bollenbach. He will be prejudiced. I want it to appear that we do not sit silent while your Honor discharges the jury.

The Court: I have not discharged the jury yet.

Mr. Simpson: I had understood that your Honor had discharged this jury.

The Court: No.

Mr. Simpson: I was badly informed. I did not want it to appear we sat idly by while that was done without objecting. But that is my motion; for the severance. I know that the cases say that it is a matter for the discretion of the trial court and no exception will be allowed unless that discretion is passed. I do not of course put myself in the position of saying your Honor is abusing any discretion but I do say it seems to me palpable, without any elaborate argument, that we are entitled to a severance. Mr. Zoline in his textbook cites a case approved by the United States Supreme Court which says that the matter is not cured by the trial judge telling the jury to disregard it, because their minds were poisoned by what occurred. I say that this jury's mind must have been poisoned when Mr. Bollenbach, whom I am not criticizing at all, he is a man on trial for a crime, when he states in the presence of the jury matters about my client and about a woman and about the District Attorney having attempted to get illegal evidence against my client, which I tried to cure as best I could with the jury, and I wish to state that I was making no attack on the District Attorney, and I shall, without unduly arguing the matter with your Honor, now ask your Honor for a severance as far as Peter Burns is concerned; that is, from Bollenbach; that is, either Bollenbach is not to be tried with us or we are not to be tried with Bollenbach or, in the alter-

native, for a mistrial as far as Peter Burns is concerned, because of what occurred after the jury was duly impaneled and sworn.

Mr. Reis: Do I understand that Senator Simpson is making the motion for the mistrial in the alternative?

Mr. Simpson: In the alternative; that is as to Peter Burns. If your Honor denies my severance, I must protect myself in some way, in my opinion, from trial with Mr. Bollenbach before this jury. Of course, I do not move for a mistrial if your Honor directs that we be severed and have a separate trial. Then of course I do not move for a mistrial.

The Court: Is there anyone else?

Mr. Sager: I would like to join in that motion, if your Honor please.

Mr. Hawthorne: I would like to move, in view of the statement of the defendant Bollenbach, as well as the statement made in court this morning, that I be relieved of the assignment to represent him in this trial. Since we were in court last week I tried to arrange an appointment with him. He has refused to cooperate, and for me to try to represent him in the trial after the last three or four weeks, where evidence will be adduced that I was unable to meet before this time, I think that it is unfair to ask me to represent him and to do a decent job.

The Court: The thing that concerns me is whether or not the defendants other than Bollenbach can safely proceed to trial with him in the case, because I think it is quite likely that he will do or say something that may prejudice the other defendants.

Mr. Reis: I would like to join in the motion of Senator Simpson for a mistrial. He said in the alternative. And with your Honor's admonition, I think that Mr. Bollenbach will be kept in check. Your Honor has warned him, and in

this case here it would not only work a hardship on the Government to sever, but there will be certain material proof necessary which will be proven by the Government which will prejudice the Government's case materially if the defendant Bollenbach will not stand trial.

I wish to call your Honor's attention to another fact: That after Bollenbach made the showing he did on Thursday, and everybody had left the courtroom, he asked Mr. Keating of the FBI, "Did I put on a good act?" So they are seeking a severance here and it is not done in good faith as far as the defendant Bollenbach is concerned, and he is putting on an act with a certain objective in mind, if your Honor please, and I think the defendant's representatives are well protected if a mistrial is granted and a new jury impaneled and the defendant Bollenbach warned as you have already warned him.

Mr. Bollenbach: May I answer Mr. Reis? I do not intend to go on trial without a counsel of my own choosing. I would rather go to jail fighting for democracy. That is what we are fighting for; democracy; and I say to you I respectfully request you to have my attorney in court here; the attorney of my choosing.

The Court: Why didn't you choose him and have him in court long before?

Mr. Bollenbach: Unfortunately, the man is definitely tied up in an anti-trust suit.

The Court: Yes; and every case in the court would have to be put off for him, and would never come to trial.

Mr. Bollenbach: But I tell you I am going to fight, and I will go to jail fighting. I am fighting for democracy. I am fighting with my attorney. The attorney of my choice shall represent me and I do not intend to have the Department of Justice slip a sly one across, as I will prove in Mr. Reis's opening, charging that this was loaded

with fraud and decide that he is trying to make a monkey out of everybody in court here.

Mr. Sager: I thought this over overnight, your Honor, and decided that we will lose a lot of time and have a lot of heartaches if we go on with Mr. Bollenbach in this trial. I do not know what the man's mental condition is. I do not think he is putting on an act. I do not think he is responsible for what he is saying.

The Court: I would like to see counsel in chambers.

(The Court and Counsel conferred in Chambers.)

(The following occurred in the courtroom not in the presence of the jury):

The Court: In view of what has taken place with respect to Mr. Bollenbach's conduct, I think it desirable from the standpoint of the other defendants that their motions, that there be a severance of this indictment, so that they will not be required to go to trial, and that motion should be granted, and I will grant the motion.

In my judgment, Mr. Bollenbach's conduct has been so contemptuous, so disrespectful and so prejudicial, that he has been guilty of contempt of court, and I so adjudge him and I sentence him to be confined to the Federal Detention Headquarters for a period of three months. The execution of that sentence is in the hands of the Marshal.

Mr. Bollenbach: I should like to have that judgment arrested until I have had a chance to seek a writ.

The Court: You communicate with the Marshal.

Mr. Bollenbach: All right; will you set bail now?

The Court: No bail.

Mr. Bollenbach: May I have an hour's time in which to consult an attorney without being incarcerated?

The Court: No; you are in the custody of the Marshal.

Mr. Bollenbach: Will your Marshal stay with me? I am in his care. I have a right to consult with an attorney and arrange bail.

The Court: There will be no bail. You will have to apply to somebody else to admit you to bail. He is in custody of the Marshal. Take him down to the Marshal. Then let him call up his attorney.

Mr. Hawthorne: Now that we have rectified one of the series of circumstances—

The Court: I will grant your motion, Mr. Hawthorne, to be relieved.

Mr. Hawthorne: I move for the discharge of the jury and the impaneling of a new jury.

The Court: I don't think I will do that. The case is severed. We can safely proceed with this jury.

(The jury entered the courtroom at 11:15 a. m.)

The Court: Ladies and gentlemen of the jury, I am sorry you have been detained this morning, but there were certain matters that had to be attended to, and I thought it necessary that what did transpire should be outside of the presence of the jury.

You recall, I have no doubt, a statement made to you on Thursday by Mr. Bollenbach and the violence of his statement. Thereafter the attorneys for the other defendants felt they might be prejudiced, that their clients might be prejudiced if the trial proceeded. As you know, Mr. Bollenbach's conduct was wild, and no one could tell what he might say throughout the course of the trial that would be prejudicial to the other defendants.

After thinking the situation over the week-end, I have come to the conclusion that he was in contempt of court for misconduct and disrespect, and that conclusion was strengthened this morning by his conduct in the courtroom. So I have finally decided to sever his case from the cases of the other defendants and I have sentenced him to imprisonment for contempt of court. He is now in the custody of the Marshal.

I could also discharge you and take a new jury with respect to the other defendants, and I want to give them an entirely fair trial, and I would not want any one of you to be prejudiced and to draw any inferences against any of the defendants that are going to trial, at least upon anything Mr. Bollenbach said on Thursday. I don't want you to indulge in any prejudices of bias or draw any unfair inference to the defendants.

In what I have done to punish him for his misconduct and disrespect, I will ask each of the jury if he or she feels in the cases of the defendants who remain in this case that they would be prejudiced by anything that has occurred in connection with the case.

(Each juror answered in the negative.)

The Court: Let the record show that each juror has said that he or she would not in any way be prejudiced by anything that has happened to or said by Bollenbach, and with that assurance, I will deny the discharge of the jury and proceed with the trial.

Mr. Ziegler: I will except to the Court's ruling about discharging the jury.

CHELL M. SMITH, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct Examination by Mr. Reis:

* * * * *

Q. You were here in May of this year, pursuant to subpoena? A. I was.

Q. Did you identify a person that you had seen in Minneapolis in January or early in February of 1937, in this building? A. To my best judgment and recollection; yes, sir.

Q. Do you know who this man is (indicating a person who had been brought into the room)? A. I don't know his name.

Q. Did you ever see that man? A. To my best judgment and recollection, yes, sir.

Q. Did the man have glasses on when you saw him (indicating person brought into the room—Bollenbach)?

Mr. Bollenbach: I respectfully state I have just been jeopardized by this particular case. I have been committed for contempt of court for three months. I am downstairs engaging counsel, so I respectfully ask don't jeopardize my interest. I respectfully ask—

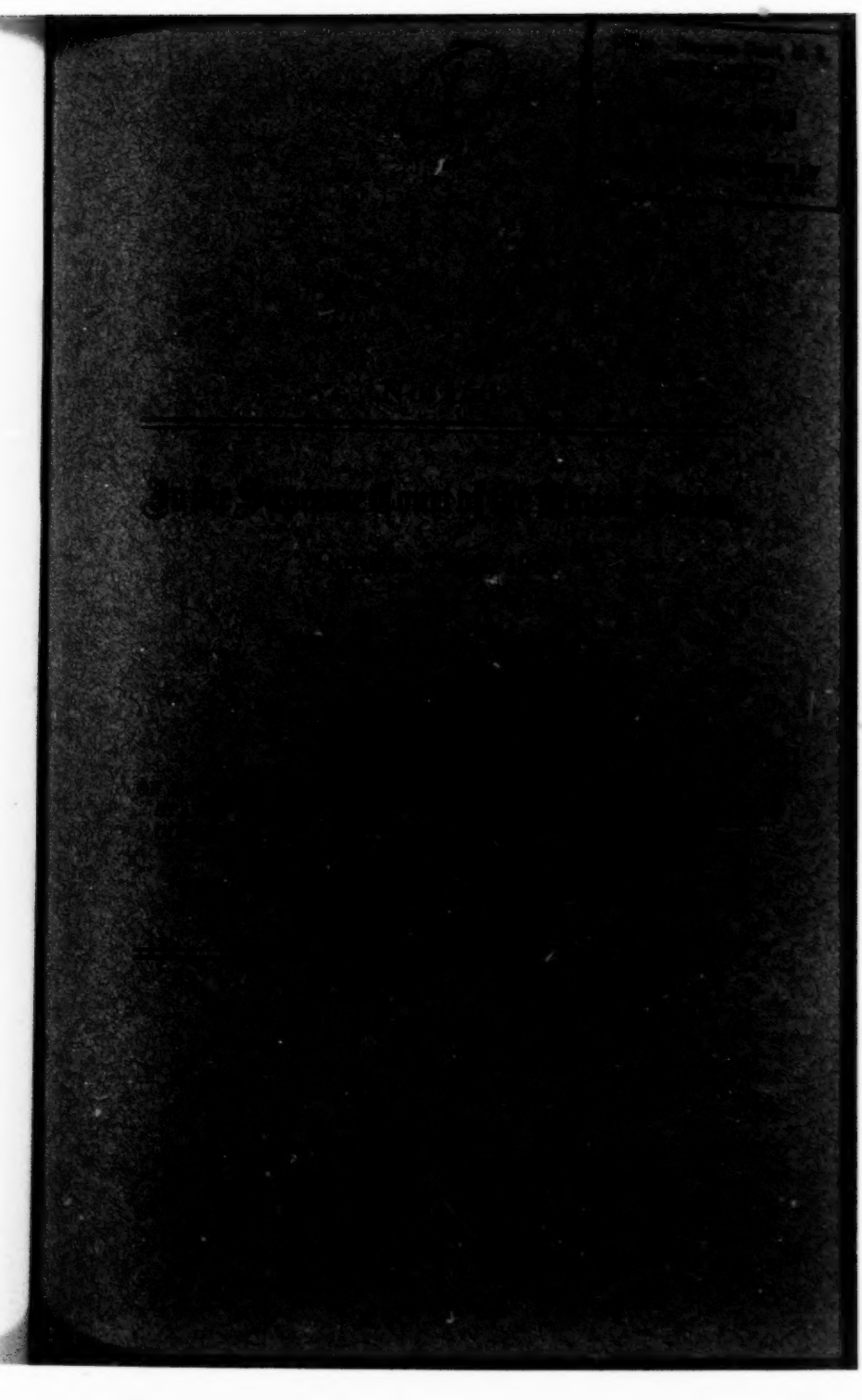
The Attendant: Be quiet.

Mr. Bollenbach: I will not be quiet. This is an educated democracy (yelling at top of his voice).

The Court: Be quiet.

Mr. Bollenbach: I will not be quiet.

The Court: Again the Judge will adjudge you in contempt of court and sentence you to three more months.



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Section 3 2
Section 37 of the Criminal Code, 18 U. S. C. 88 3

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 156

PETER W. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 864–869) is reported at 135 F. (2d) 867.

JURISDICTION

The judgment of the circuit court of appeals was entered June 7, 1943 (R. 869–870). The petition for a writ of certiorari was filed July 12, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction.

2. Whether the conspiracy to violate the National Stolen Property Act had terminated at the time of the commission of the overt acts, which were alleged to have occurred in the state of destination subsequent to the interstate transportation.

3. Whether the trial court committed error in failing to declare a mistrial after directing a severance as to one of the defendants at the opening of the trial because of his contumacious conduct.

4. Whether it was error to admit evidence that a codefendant had on previous occasions sold stolen securities.

5. Whether it was improper for the trial judge in his charge to the jury to suggest hypothetical circumstances involving the defendants for the purpose of illustrating a point of law.

STATUTES INVOLVED

Section 3 of the National Stolen Property Act of May 22, 1934, c. 333, 48 Stat. 794, as amended by the Act of August 3, 1939, c. 413, Sec. 1, 53 Stat. 1178 (18 U. S. C. 415), provides in pertinent part as follows:

> Whoever shall transport or cause to be transported in interstate or foreign com-

> merce any * * * securities * * * of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both * * *.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

An indictment in two counts was returned against petitioner and five others[1] in the United States District Court for the Southern District of New York, charging them with having transported and caused to be transported in interstate commerce stolen securities of the value of more than $5,000, knowing them to have been stolen, and with having conspired to commit that offense (R. 5–8). The defendants Blaser and

[1] George A. Turley, Chester G. Bollenbach, Herbert G. Jacobson, Fred Blaser, and Ernest D. Ingalls.

Ingalls pleaded guilty (R. 18, 162, 229), the court directed a severance as to Bollenbach shortly after the opening of the trial (R. 40), and petitioner, Turley, and Jacobson were jointly tried and convicted (R. 834). Petitioner was sentenced to two years' imprisonment on the first count and to ten days' imprisonment on the second, to run consecutively (R. 27). On appeal by petitioner and Turley, their convictions were affirmed (R. 869–870).

The evidence against petitioner may be summarized as follows:

Petitioner was engaged in New York City in the business of obtaining and selling lists of stockholders and bondholders, particularly of companies in the process of reorganization (R. 79, 82, 688, 708). He had known the defendant Bollenbach for ten years and the latter had used his office as a mailing address (R. 80, 710). The defendant Turley was a practicing attorney. He also financed the securities brokerage business conducted by the defendants Blaser and Ingalls (R. 165–169, 230–231). Petitioner had known Turley since 1935 (R. 357, 359).

In April 1937 it was discovered that 25 gold notes attached to proofs of claim filed in the reorganization proceedings of the Minnesota and Ontario Company were missing from the files of the United States District Court at Minneapolis, Minnesota (R. 47–48, 50). No one had been authorized to remove these notes from the files

(R. 48). Petitioner and Bollenbach had been in Minneapolis late in January 1937 (R. 51, 55, 60, 71, 81), and Bollenbach had examined the files where the notes were kept (R. 51, 55). Petitioner admitted on cross-examination that he too had been in the court house in Minneapolis and had inspected court records in the reorganization (R. 707–708). He also admitted that either on his way to or return from Minneapolis he had telephoned Turley in New York from Chicago (R. 712).

About the first of February 1937, Bollenbach, under the alias of Berendson, rented an office in New York City (R. 91) which he kept for about three weeks (R. 92). Petitioner also returned to New York on February 1, 1937 (R. 704), and was frequently seen in Bollenbach's office during the early part of that month (R. 91). Bollenbach had the notes which had been stolen from the files of the district court in Minneapolis and attempted to dispose of ten of them through Hart Smith & Co. (R. 101–105), but was unsuccessful when that company became suspicious of a typewritten endorsement in the name of Berendson which appeared on its check given in payment for the notes and therefore stopped payment on the check (R. 123–124, 284–285). The sale of the remaining fifteen notes was effected by Bollenbach and Turley through the defendants Blaser and Ingalls (R. 172, 174–175, 176–178, 232–233) and the proceeds of the sale were de-

livered by Ingalls to Turley on February 11, 1937 (R. 233, 234). Petitioner was in Turley's office at the time the money was delivered and received a substantial portion of it (R. 234–235).[2] On February 15, 1937, petitioner deposited $1,200 in cash in the bank account which he maintained under the business name of the Bond and Share List Company (R. 269, 698, 705). Petitioner's usual deposits in that account totalled about $250 a week (R. 83).

ARGUMENT

1. Petitioner challenges (Pet. 10, 16–24) the sufficiency of the evidence to support his conviction, both on the substantive and the conspiracy counts. The circuit court of appeals, however, found the evidence of petitioner's guilt "substantial" (R. 867).

This is not, as petitioner asserts (Pet. 16–20), a case in which the jury was allowed to base inference on inference and thus to predicate its verdict on speculation alone. As shown in the Statement, *supra,* pp. 3–6, the prior relationship of petitioner with Bollenbach and Turley, petitioner's presence in Minneapolis at about the same time Bollenbach was there, his telephone conversation with Turley during his trip, the disappearance of the gold notes from the files of the district court at Minneapolis and their reap-

[2] Ingalls, who testified for the Government, said that petitioner received a "stack of bills" after Turley had pocketed some of the money and paid Ingalls (R. 234–235).

pearance in New York in Bollenbach's hands, petitioner's constant association with Bollenbach in New York during the critical period when the notes were being sold, and his substantial share in the proceeds of the sale, were all proved by direct evidence. The jury obviously inferred from this collocation of circumstances that petitioner transported or participated with Bollenbach in the transportation of the notes from Minneapolis to New York. Such an inference is not only possible under the evidence;[3] it is, we submit, almost inevitable. In particular, petitioner's participation in the profits of the venture although he did not act as a broker in effecting the actual sales, coupled with the admitted fact that he was in Minneapolis shortly before the notes were first offered for sale in New York, points inescapably to the conclusion that he was an active participant in the unlawful transportation of the notes. Cf. *United States* v. *Seeman*, 115 F. (2d) 371, 374 (C. C. A. 2).

The same facts amply show that there was a conspiracy among the defendants to transport the stolen notes to New York and dispose of them there. It is settled, of course, that a con-

[3] The evidence, with the inferences reasonably to be derived therefrom, must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Manton*, 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Meyers* v. *United States*, 94 F. (2d) 433, 434 (C. C. A. 6), certiorari denied, 304 U. S. 583.

spiracy need not be proved by direct evidence, but may be inferred from the circumstances and the acts of the parties. *Direct Sales* v. *United States,* No. 593, October Term, 1942, decided June 14, 1943; *Glasser* v. *United States,* 315 U. S. 60, 80; *United States* v. *Manton,* 107 F. (2d) 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664; *United States* v. *Harrison,* 121 F. (2d) 930, 934 (C. C. A. 3), certiorari denied, 314 U. S. 661. And, contrary to petitioner's contention (Pet. 20–24), his acts subsequent to the actual transportation were relevant as circumstances to be considered in determining his original intent and the existence of a conspiracy among the parties. *United States* v. *Seeman,* 115 F. (2d) 371, 373 (C. C. A. 2); *Shama* v. *United States,* 94 F. (2d) 1, 4 (C. C. A. 8), certiorari denied, 304 U. S. 568; *United States* v. *McGuire,* 64 F. (2d) 485, 493 (C. C. A. 2), certiorari denied, 290 U. S. 645.

2. There is no merit in petitioner's further contention (Pet. 11, 20–24) that the conviction on the conspiracy count cannot stand for the reason that the overt acts charged in the indictment did not occur until after the notes had come to rest in New York, and particularly because the only overt act in which his participation was proved, the third, relating to a meeting at which the spoils were divided (R. 7; cf. R. 234–235), did not take place until February 11, 1937, after the notes had been sold. As the circuit court of appeals held (R. 869), "it is immaterial when, if ever, the notes ceased to

be in interstate commerce before the conspirators disposed of them." A conspiracy continues until the object for which it was formed has been accomplished. *McDonald* v. *United States,* 89 F. (2d) 128, 133 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Laska* v. *United States,* 82 F. (2d) 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Skelly* v. *United States,* 76 F. (2d) 483, 489 (C. C. A. 10), certiorari denied, 295 U. S. 757; *United States* v. *McGuire,* 64 F. (2d) 485, 492 (C. C. A. 2), certiorari denied, 290 U. S. 645; *Loftus* v. *United States,* 46 F. (2d) 841, 847 (C. C. A. 7); *Wilkerson* v. *United States,* 41 F. (2d) 654, 655 (C. C. A. 7), certiorari denied, 282 U. S. 894; *Bellande* v. *United States,* 25 F. (2d) 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607. Clearly, the purpose of this conspiracy was not accomplished until the notes had been sold and the proceeds distributed among the conspirators. Hence, all the overt acts charged and proved were in furtherance of a continuing conspiracy.

In any event, since a purpose of the transportation of the stolen notes was, unquestionably, to sell them in New York, interstate commerce continued until the notes were delivered for sale in that state. (Cf. *Levi* v. *United States,* 71 F. (2d) 353, 354 (C. C. A. 5); *Farris* v. *United States,* 5 F. (2d) 961, 962 (C. C. A. 7).) The conspiracy therefore continued at least until that time. The first two overt acts charged—the conversations among Tur-

ley, Blaser, Ingalls, and Bollenbach (R. 7)—occurred before fifteen of the notes were handed over to Blaser and Ingalls to be sold (R. 174–176, 233). Even if the third overt act, the division of the spoils on February 11, 1937 (R. 234–235), is deemed to have occurred after the conspiracy had terminated, petitioner was properly convicted since the proof showed that he was a member of the conspiracy when the other overt acts occurred. It was unnecessary to prove that petitioner personally committed any of the overt acts charged; it was sufficient to show that one of the conspirators committed an overt act. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253–254; *United States* v. *Rabinowich,* 238 U. S. 78, 86; *Bannon* v. *United States,* 156 U. S. 464, 468.

3. Petitioner complains (Pet. 9, 12–14) that he was prejudiced by the failure of the trial judge to discharge the jury and declare a mistrial after directing a severance as to the defendant Bollenbach because of the latter's contumacious conduct in his opening statement to the jury.[4] The record shows that the trial judge took great care

[4] Bollenbach's speech to the jury, which is included as part of Appendix B of the petition (pp. 37–41), was not incorporated into the record by the bill of exceptions (see R. 31–32, 861). Petitioner's claim of prejudice is grounded upon Bollenbach's statement that he would prove that a Government agent had "browbeat" a young lady, presumably a friend of petitioner's. Petitioner asserts that by these remarks, Bollenbach "attempted to defend" petitioner and suggested to the jury "that there was some connection between"

to assure a fair and impartial trial. Although at first reluctant to grant a severance as to Bollenbach because of his conduct (R. 33–34), the judge later did so when he became convinced that Bollenbach might so conduct himself during the course of the trial as to prejudice the other defendants (R. 38–40). Before allowing the trial to proceed before the jury which had already been impanelled, the judge polled the jury to ascertain whether any of the jurors would be prejudiced against the remaining defendants by reason of Bollenbach's conduct and the judge's action in sentencing him for contempt (R. 41–42). It is significant, too, that following Bollenbach's remarks of which petitioner now complains petitioner's counsel moved in the alternative for a severance or a mistrial and disclaimed any desire for a mistrial if the motion for a severance were granted (R. 37–38). Clearly, the trial judge acted with care and deliberation before allowing the jury to hear the case. Under such circumstances the exercise of his discretion is not subject to review. *Stroud* v. *United States,* 251 U. S. 15, 20; *United States* v. *Hirsch,* 74 F. (2d) 215, 219 (C. C. A. 2); *Van Riper* v. *United States,* 13 F. (2d) 961, 967 (C. C. A. 2), cer-

them (Pet. 2–3; see also Pet. 13). The remarks were but an insignificant part of Bollenbach's violent tirades for which he was later adjudged to be in contempt. Following this, but before any evidence had been taken, the judge directed that the trial be severed as to Bollenbach (R. 40).

tiorari denied *sub nom. Ackerson* v. *United States,* 273 U. S. 702; *Belvin* v. *United States,* 12 F. (2d) 548, 550 (C. C. A. 4), certiorari denied, 273 U. S. 706; *Marrin* v. *United States,* 167 Fed. 951, 953 (C. C. A. 3), certiorari denied, 223 U. S. 719.

4. Petitioner objects (Pet. 10, 15–16) to the admission of evidence that the defendant Turley had previously engaged in selling securities which had been stolen or obtained by fraud (R. 408–420, 458–467, 520–523, 571–577, 602, 605–608). This evidence that he had "created a market" for the stolen notes involved in the instant case was proper to establish Turley's part in the substantive offense. *United States v. Crimmins,* 123 F. (2d) 271, 273 (C. C. A. 2); *United States* v. *Seeman,* 115 F. (2d) 371, 373 (C. C. A. 2). Petitioner did not object to the evidence when it was introduced, and the record is barren of any request by petitioner to have the admission of the evidence limited to Turley, although the trial judge himself did so limit some of it (R. 409). Moreover, there was nothing to indicate that petitioner was in any way involved in Turley's prior activities, and the evidence concerning them could not have prejudiced petitioner. Cf. *Andrews* v. *United States,* 108 F. (2d) 511, 514 (C. C. A. 4); *Loftus* v. *United* States, 46 F. (2d) 841, 845 (C. C. A. 7). The case against petitioner depended upon proof that he participated in the actual transportation of the notes from Minne-

apolis to New York and he is in no position to complain because additional and different proof was required to tie in another defendant who had never left New York.[5]

5. Finally, petitioner asserts (Pet. 6–7, 25–26) that he was prejudiced by the following statement in the judge's charge to the jury (R. 826):

> It is not necessary at all for Turley or Jacobson to be out in Minneapolis at all. In saying what I am about to say please do not feel that I am expressing any view held by myself, but I am trying to illustrate to you. Let us say for example Turley agreed to finance Bollenbach and Burns in going out to steal those bonds in Minneapolis, knowing they were there in the clerk's office. He would be as guilty then if they brought back the bonds to Turley in New York as if Turley was out in Minneapolis, because they would be acting for him in this work.

[5] Petitioner also objects (Pet. 10, 26–27) to the admission of the testimony given by the defendant Jacobson before the grand jury that he had had a conversation with Turley and petitioner (R. 303) and that petitioner had played an active part with Jacobson in the attempt to secure payment of the $2500 Hart Smith & Co. check (R. 306–307, 309; see p. 5, *supra*). The testimony was admitted only against Jacobson (R. 313). It is well established that admissions by a conspirator subsequent to the conspiracy are admissible against him at a trial with other conspirators if the trial judge properly limits the applicability of such testimony to the person making the admissions. *Troutman* v. *United States*, 100 F. (2d) 628, 634 (C. C. A. 10); *United States* v. *Newhoff*, 83 F. (2d) 942, 944 (C. C. A. 2), certiorari denied, 299 U. S. 565; *Brooks* v. *United States*, 8 F. (2d) 593, 595 (C. C. A. 9).

> It is not for me to say, and I don't mean to indicate, as I said a moment ago, that that was the fact; but you are entitled to take all these circumstances into account in coming to a conclusion whether this is a planned theft or transportation of these bonds.

As the quotation itself shows, the trial judge explicitly admonished the jury that his illustration was not to be taken as an expression of his opinion upon the evidence. The illustration given was a correct statement of the law (*United States* v. *Seeman,* 115 F. (2d) 371, 374 (C. C. A. 2)), and it was, moreover, justified by the evidence. The judge was merely illustrating by reference to the circumstances presented by the proof the principle that a person may be guilty of causing the transportation of stolen property in interstate commerce although he himself never crosses state lines. Furthermore, in view of the evidence, this principle could have application only to Turley and Jacobson and petitioner could not have been prejudiced thereby. The jury were clearly and repeatedly told that the issues of fact were for their determination (R. 821, 826, 827, 829). Hence, even if the illustration given be considered an expression of opinion, it would not constitute grounds for reversal. *United States* v. *Murdock,* 290 U. S. 389, 394; *Quercia* v. *United States,* 289 U. S. 466, 469; *Horning* v. *District of Columbia,* 254 U. S. 135, 138, 139; *Allis* v. *United*

States, 155 U. S. 117, 123; *Simmons* v. *United States,* 142 U. S. 148, 155; *United States* v. *Goldstein,* 120 F. (2d) 485, 491 (C. C. A. 2), affirmed, 316 U. S. 114; *Marino* v. *United States,* 91 F. (2d) 691, 699 (C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States,* 302 U. S. 764.

CONCLUSIONS

The decision below is correct, and there is involved no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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